UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MARIO ABATE,
and ELDA ABATE,

Plaintiffs,

-against-

COMPLAINT

Index No.:

CITY OF TROY, NEW YORK
and HARRY TUTUNJIAN,

Defendants.

Plaintiffs, MARIO ABATE and ELDA ABATE, by and through their attorney David Brickman, Esq., submit the following as their Complaint and demand a jury as follows:

INTRODUCTION AND JURISDICTIONAL STATEMENT

1. This is a civil rights action for declaratory relief, injunctive relief, and for damages brought pursuant to the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983.

2. Plaintiff seeks a declaration that §§ 205-17 through 205-27 of Article III of Chapter 205 of the Code of the City of Troy, New York violates the Fifth and Fourteenth Amendments to the Constitution of the United States on its face and as applied to plaintiffs.

3. Plaintiff further seeks damages, pursuant to 42 U.S.C. § 1983, against defendants, who, while acting under color of law, specifically §§ 205-17 through 205-27 of Chapter 205 of the Code of the City of Troy, New York, deprived plaintiff of her property by unreasonably seizing property known as the Eldorado and the apartments located above, situated at 121 Fourth Street, in the City of Troy, [hereinafter "the Premises"], without adequate notice, without an appropriate opportunity to be heard, and without due process of law.

4. The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. § 1343 (civil rights jurisdiction).

5. Plaintiffs demands a jury trial of this action.

PARTIES

6. Plaintiff, Elda Abate, is an individual and owns the property located at 121 Fourth Street in the City of Troy and the State of New York.

7. Plaintiff, Mario Abate, is the sole shareholder and only officer of 121 Fourth Street Company, Inc., which is the owner of Eldorado Bar, and tenant of Elda Abate.

8. Defendant, City of Troy, is a municipality organized and existing by virtue of the laws of the State of New York.

9. Defendant, Harry Tutunjian, is the Mayor for the City of Troy. The claims against Harry Tutunjian are asserted against him both in his official capacity as well as in his individual capacity.

10. Each of the foregoing defendants is a person as that term is defined for the purposes of 42 U.S.C. § 1983.

FACTUAL ALLEGATIONS

11. By Notice of Hearing dated May 4, 2004, the city presented three charges. Charge number one was that the crime of Unlawfully Dealing With a Child, in violation of Penal Law § 260.20, occurred in the bar area of Eldorado. Charge number two was that the crime of Unlawfully Dealing With a Child, in violation of Penal Law § 260.20, occurred in the Bar area of Eldorado. Charge number three was Criminal Possession of a Controlled Substance in the Third Degree, in violation of Penal Law §§ 220.06 and 220.16.

12. On June 4, 2004, a hearing was held before Nia Cholakis, Esq., to determine whether the petitioners violated § 205-21(c) of the Troy City Code, commonly known as Troy's Nuisance

Abatement Law.

13. Captain Paul Bouchard of the Troy Police was subpoenaed to testify for petitioner and failed to appear. Petitioner retained the right to call the witness. By letter dated July 9, 2004 petitioner requested the hearing be reconvened to allow him to testify.

14. The hearing officer issued a decision on September 26, 2004 without giving petitioner an opportunity to call Capt. Bouchard pursuant to subpoena.

15. The decision did not make findings of fact or conclusions of law and recommended closing of the Eldorado for 90 to 180 days.

16. Petitioners filed objections to the Mayor's office to the proceedings pursuant to the decision of the hearing officer. The Mayor did not respond.

17. Petitioner demanded a hearing to determine what an adequate punishment should be. No hearing was held.

18. On November 9, 2004, the Mayor issued an order closing the Eldorado bar and the motel above it for a period of one year. The order was filed in the clerk's office on November 18, 2004 and served on December 29, 2004. Petitioners' right to any City licenses were revoked for one year.

19. On February 19, 2005, the Mayor closed the Eldorado Bar and threatened to evict the residents of the building.

20. 121 Fourth Street Corp. is the owner of the Eldorado and was never given notice of these proceedings, nor was it named in these proceedings and given an opportunity to be heard.

21. The numerous residential tenants of 121 Fourth Street were never given notice of these proceedings, nor named in these proceedings and given an opportunity to be heard.

AS FOR A FIRST CAUSE OF ACTION

UNCONSTITUTIONALITY OF THE CODE PROVISION: FACIAL INVALIDITY

22. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 21 as if set forth at length herein.

23. Sections 205-19 through 205-28 of the Code of the City of Troy, New York are unconstitutional on their face.

24. The Code provisions at issue are unconstitutional because the interests of the public generally do not require government interference to such an extreme degree, because the means employed by the City of Troy are not reasonably necessary for the accomplishment of their asserted purpose, and because the means employed by the City are unduly oppressive upon individuals who are subjected to enforcement of the provisions.

25. The provisions here at issue are unconstitutional, because they, under the guise of protecting the public interests, arbitrarily interfere with private business, and impose unusual and unnecessary restrictions upon lawful occupations.

26. The legislatures of the City of Troy and the State of New York have already assessed the various violations enumerated in § 205-19, and those bodies have assigned appropriate degrees and penalties for the violations described therein. There is no basis or reasonable necessity for the City of Troy to arbitrarily group and assign points to the violations in a way so unrelated to the policies and goals that the legislatures embraced when they adopted the underlying codes and regulations. The result is the arbitrary assignment of equal point values to violations that are patently incongruous.

27. The nuisances which justify a closure order in a constitutionally sound manner are sufficiently predictable that an ordinance could be drawn which provides adequate notice to both officials administering the ordinance and to the affected members of the public of the nature of the conditions warranting closure.

28. The provisions at issue are unconstitutional because many of the violations enumerated in § 205-19 are not related to the nature of the conditions which would be expected to warrant closing of an otherwise legitimate business.

29. The provisions at issue are unconstitutionally vague in violation of the Fifth and Fourteenth Amendments because, as the ordinance is written, persons of common intelligence must necessarily guess at the nature of the circumstances constituting a nuisance and necessarily will differ as to the application of the ordinance to particular acts or failures to act of the owners of property subjected to the provisions. A statute which denies notice of the prohibited conduct because it would be irrational to take such notice, is violative of due process of law.

30. The ordinance at issue is unconstitutionally vague in violation of the Fifth and Fourteenth Amendments because it fails to give fair notice of what to avoid, as the means to avoidance are outside the control of the property owners who are subject to the provisions.

31. The provisions at issue are unconstitutionally vague because they endow government officials with unbridled discretion to determine when the ordinance will be enforced.

32. The provisions at issue violate the Equal Protection Clause of the Fourteenth Amendment because they arbitrarily discriminate against owners of property in neighborhoods that are otherwise deteriorated by the conduct of neighborhood residents, and because such conditions are outside the control of the owners of property.

33. The provisions unduly place the responsibility of law enforcement in the hands of property owners and takes such responsibility out of the hands of those specially trained to enforce the rules and regulations which establish a nuisance as a nuisance is described in § 205-19.

AS FOR A SECOND CAUSE OF ACTION

UNCONSTITUTIONALITY OF THE CODE PROVISION: OVERBREADTH

34. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 33 as if set forth at length herein.

35. The ordinance at issue is unconstitutionally overbroad in violation of the Fifth and Fourteenth Amendments because it necessarily brings within its sweep a wide variety of conduct which could never satisfy constitutional standards for closure of a business on grounds of nuisance without sufficient notice and a complete and thorough opportunity to be heard.

36. For example, inter alia, violations and crimes of patrons and other problems not related to the legitimate business activities of the building or conditions of the neighborhood could not justify closure of a business on a nuisance basis without sufficient notice and a complete and thorough opportunity to be heard.

37. Although the provisions purport to require such procedures, more guidance must be provided in the language thereof in order to prevent erroneous deprivations and arbitrary enforcement by the Administrative Law Judge.

38. Although the provisions purport to require sufficient procedures, a clause allowing judicial review must be included in order to prevent erroneous deprivations and arbitrary enforcement.

AS FOR A THIRD CAUSE OF ACTION

UNCONSITUTIONALITY OF THE CODE PROVISIONS AS APPLIED TO PLAINTIFFS

39. While abatement of a nuisance without notice and an opportunity to be heard may be constitutional in appropriate circumstances, an ordinance authorizing such action may not do so without an appropriate definition of the nuisance that is specific enough to provide some standards for controlling government action and for reducing the risk of erroneous deprivation.

40. While the provisions purport to provide notice and an opportunity to be heard, such procedures were not in fact provided for the plaintiffs in this action. Such oversight has led to

violation of the plaintiffs' procedural Due Process rights in contravention of the Fifth and Fourteenth Amendments.

AS FOR A FOURTH CAUSE OF ACTION

FOR DAMAGES PURSUANT TO 42 U.S.C. § 1983 FOURTH AMENDMENT

41. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 40 as if set forth at length herein.

42. Defendants' closure of plaintiff's property constitutes a seizure of her property within the meaning of the Fourth Amendment to the United States Constitution.

43. Such seizure was unreasonable.

44. Defendants deprived plaintiffs of the rights secured to them by the Fourth and Fourteenth Amendments to the Constitution of the United States.

45. Defendants acted under color of state law, that is, pursuant to the aforementioned ordinances of the City of Troy.

46. Defendants' actions proximately caused damages to plaintiff.

AS FOR A FIFTH CAUSE OF ACTION

FOR DAMAGES PURSUANT TO 42 U.S.C. § 1983 FIFTH AMENDMENT

47. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 46 as if set forth at length herein.

48. The closure of plaintiff's business is a deprivation of his property.

49. Plaintiffs were deprived of their property without due process of law in that they were not given notice and an opportunity to be heard prior to being deprived of their property.

50. Defendants deprived plaintiffs of their property in a non-nuisance situation, when giving them notice and an opportunity to be heard was not in any way impractical.

51. Defendants deprived plaintiffs of their rights secured to them by the Fifth and Fourteenth Amendments to the Constitution of the United States.

AS FOR A SIXTH CAUSE OF ACTION

FOR DAMAGES PURSUANT TO 42 U.S.C. § 1983 FIFTH AMENDMENT

52. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 50 as if set forth at length herein.

53. Defendants acted arbitrarily, oppressively, and in a conscience-shocking manner in authorizing the closure of plaintiff's business.

54. Defendants' actions deprived plaintiffs of their substantive due process rights guaranteed to her by the Fifth and Fourteenth Amendments to the United States Constitution.

AS FOR A SEVENTH CAUSE OF ACTION

FOR DAMAGES PURSUANT TO 42 U.S.C. § 1983 FOURTEENTH AMENDMENT

55. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 54 as if set forth at length herein.

56. Defendants intentionally targeted plaintiff's business for closure because of its reputation and for other reasons, knowing full well that there were other buildings throughout the City with worse conditions. Other business owners were permitted to abate similar conditions at their properties, though plaintiff was not afforded that opportunity.

57. Defendants' pattern and practice of failing to treat similarly situated properties alike deprived plaintiffs of their right to equal protection of the law guaranteed to her by the Fourteenth Amendment to the United States Constitution.

WHEREFORE, plaintiffs respectfully request that judgment be entered as follows:

1. Declaring and adjudging that §§ 205-19 through 205-28 of Part II, of Chapter 205 of the

Code of the City of Troy, New York violates the Fifth and Fourteenth Amendments to the Constitution of the Untied States;

2. Restraining and enjoining the City of Troy by and through its agents from enforcing the aforesaid provisions of the Troy City Code which violates the Constitution of the United States;

3. Declaring and adjudging that the defendants, individually and acting in concert, have violated plaintiffs' right to be free from unreasonable searches and seizures as guaranteed by the Fourth and Fourteenth Amendments to the Constitution of the United States, plaintiffs' procedural and substantive due process rights as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States, and plaintiffs' right to equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

4. Declaring that the closure of plaintiff's property at 121 Fourth Street located in the City of Troy and the State of New York is unlawful, directing that it be removed, and enjoining and restraining any future attempt by the City of Troy to otherwise interfere with plaintiff's lawful business activities.

5. Pursuant to 42 U.S.C. § 1983, for compensatory damages against defendants jointly and severally in the amount of $1,000,000.00 together with interest thereon.

6. Pursuant to 42 U.S.C. § 1988, for the cost, disbursements, and reasonable attorneys' fees incurred by plaintiffs in the prosecution of this action;

7. For such other and further relief as this Court may deem just, proper and equitable.

DATED: November 9, 2007

Respectfully submitted,

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